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No. 97-1579

In the Supreme Court of the United States

OCTOBER TERM, 1997

ZENITH/KREMER WASTE SYSTEMS, INC. AND UNITED WASTE SYSTEMS, INC.,

Petitioners,

v.

WESTERN LAKE SUPERIOR SANITARY DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

MOTION OF WASTE MANAGEMENT OF MINNESOTA, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE SUPPORTING THE PETITION FOR CERTIORARI

DENNIS M. WILT
Waste Management of Minnesota, Inc.
2 Westbrook Corp. Ctr.
Suite 1000
Westchester, IL 60154
(708) 409-0700

EVAN M. TAGER
Counsel of Record
HAROLD S. REEVES
Mayer, Brown & Platt
2000 Pennsylvania Ave, NW
Washington, DC 20006
(202) 463-2000

15 pp

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MOTION OF WASTE MANAGEMENT OF MINNESOTA, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, amicus curiae Waste Management of Minnesota, Inc. ("Waste Management") requests leave to file the accompanying brief in support of the petition for certiorari. Although counsel for petitioner has consented to the filing of this brief, counsel for respondent has refused consent.

Waste Management owns and operates solid waste handling and transportation operations throughout the State of Minnesota. It uses a number of disposal facilities for the solid waste it manages, including facilities in Wisconsin and Iowa. The decision of the Minnesota Supreme Court in this matter could, if allowed to stand, adversely impact Waste Management's ability to engage in interstate commerce by using these out-of-state disposal facilities.

Waste Management seeks leave to file its brief as amicus curiae in order to bring to the Court's attention a report to Congress from the United States Environmental Protection Agency regarding the

effect of "flow control" measures, like that adopted by respondent, upon interstate commerce in municipal solid waste. The findings of this report undercut the rationale of the decision below and further emphasize the nationwide impact that this case would have in the area of solid waste disposal. This report also confirms that the decision of the Minnesota Supreme Court would, if allowed to stand, have the practical effect of eviscerating this Court's decisions in *West Lynn Creamery, Inc.* v. *Town of Healy*, 512 U.S. 186 (1994), and *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383 (1994).

For the foregoing reasons, the motion of Waste Management to file the accompanying brief as amicus curiae in support of the petition for certiorari should be granted.

Respectfully submitted.

DENNIS M. WILT
Waste Management of Minnesota, Inc.
2 Westbrook Corp. Ctr.
Suite 1000
Westchester, IL 60154
(708) 409-0700

EVAN M. TAGER
Counsel of Record
HAROLD S. REEVES
Mayer, Brown & Platt
2000 Pennsylvania Ave, NW
Washington, DC 20006
(202) 463-2000

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INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is described in the preceding motion for leave to file this brief.[1]

SUMMARY OF ARGUMENT

Respondent, Western Lake Superior Sanitary District ("the District"), has enacted a scheme that imposes fees upon both interstate and intrastate waste, but uses the money collected from those fees to subsidize only local waste processors. The practical effect of this discriminatory regime is not only to benefit local competitors at the expense of out-of-state competitors but also to restrict the export of waste generated within the District. Reasoning that the burdens that this scheme places upon interstate commerce are outweighed by the financial gains to local waste incinerators, the Supreme Court of Minnesota refused to strike down the District's system of fees and subsidies. Pet. App. A12-A14. The court's ruling, however, simply cannot be reconciled with this Court's decisions in *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383 (1994), and *West Lynn Creamery, Inc.* v. *Town of Healy*, 512 U.S. 186 (1994).

As the United States Environmental Protection Agency's "Report to Congress on Flow Controls and Municipal Solid Waste" reveals, the type of flow control measures adopted by the District does nothing to promote public health or to protect the environment. These goals, the EPA has concluded, are served by local waste management programs and regulations that operate regardless of whether a community has attempted to restrict or direct the flow of interstate commerce in solid waste.

The Report also explains how flow control measures, like those adopted by the District, serve to subsidize local competitors in interstate commerce. By restricting the export of locally-generated

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[1] Pursuant to Rule 37.6, amicus informs the Court that counsel for petitioner supplied amicus with a preliminary draft of this brief, which the undersigned counsel have substantially rewritten for filing in this Court.

waste, flow control laws ensure that local waste is disposed of at local facilities, thereby depriving out-of-state competitors of the opportunity to compete for that waste and ensuring that the local facility operates in a non-competitive market.

Similar, although perhaps less ingenious, attempts by the States to promote local competitors at the expense of their out-of-state rivals have been uniformly rejected by the Court. In *Carbone*, for example, the Court struck down a New York municipal ordinance that required all waste generated within the municipality to be disposed of at a particular local facility. This attempt to restrict the export of waste was, the Court concluded, inimical to the vision of a free and open national market that the Commerce Clause was intended to promote. Likewise, in *West Lynn Creamery*, the Court rejected an attempt by Massachusetts to subsidize local milk producers out of funds collected from in-state and out-of-state milk producers. This attempt to subsidize local competitors over and at the expense of interstate competitors violated the anti-discrimination principals embodied in the Commerce Clause. Because the District's fee and subsidy scheme shares all of the flaws found fatal to the statutes in both *Carbone* and *West Lynn Creamery*, the Court should grant the petition for certiorari, overturn the decision of the Minnesota Supreme Court, and confirm that the protections of the Commerce Clause cannot be defeated through cleverly drafted schemes, no matter how ingenious or how novel those schemes might be.

ARGUMENT

The issues raised in the petition arise in the context of an industry of nationwide scope: namely, the handling and safe disposal of the approximately 200 million tons of municipal solid waste generated annually in this country. Congress has enacted mandatory environmental standards that have heightened the interstate nature of the waste disposal market. As smaller, less efficient, local landfills have reached capacity or closed in order to avoid the cost of compliance with these new environmental regulations, newer and larger landfills that meet the strict federal standards have been built to replace lost capacity. These landfills often serve regions comprising parts of several states. Thus, now more than ever, solid waste regularly crosses state lines as part of

an integrated regional and national market that Congress intended to develop. See 42 U.S.C. § 6946(c).

The Commerce Clause questions presented in this case are well framed for resolution. Respondent has candidly admitted that its fee and subsidy scheme is intended to keep solid waste within District boundaries. Pet. 4-5. Respondent also has admitted that its purpose in enacting this scheme was to finance the operations of its local incinerator. *Ibid.* In the face of this Court's decision explicitly rejecting a similar financial justification in *Carbone*, 511 U.S. 383, the Minnesota Supreme Court nevertheless held that these economic benefits outweighed any burdens imposed upon interstate commerce. Pet. App. A12-A14. Nor is the effect on the free flow of interstate commerce de minimis — respondent's fee and subsidy program has effectively closed off the District to interstate commerce in waste disposal services. As in *Carbone* and *West Lynn Creamery*, 512 U.S. 186, there is no need to wait for further refinement of this issue or for a clear conflict among the lower courts. The Court should decide now whether respondent's fee and subsidy plan constitutes an impermissible subsidy of local competitors engaged in interstate commerce.

I. THE EPA'S REPORT REVEALS THAT RESPONDENT'S FEE AND SUBSIDY PROGRAM DOES NOT PROMOTE HUMAN HEALTH OR PROTECT THE ENVIRONMENT

States and municipalities resort to a familiar argument whenever their efforts to restrict interstate commerce in solid waste come under attack: namely, that their restrictions are necessary to promote the health of their residents and to protect the environment. The Court should be aware that a recent study by the United States Environmental Protection Agency (EPA) utterly refutes this argument.

The EPA prepared its "Report to Congress on Flow Controls and Municipal Solid Waste" in 1995. U.S. Environmental Protection Agency, REPORT TO CONGRESS ON FLOW CONTROLS AND MUNICIPAL SOLID WASTE, EPA 530-R-95-008, I-1 (March 1995) ("FLOW CONTROL REPORT"). The EPA examined legal flow controls, which it defined as regulatory provisions that designate where the solid waste generated in a municipality must be taken for

processing, treatment, or disposal. *Ibid.* At the time the Report was prepared, 35 states and the District of Columbia had authorized the use of some form of flow control. *Id.* at ES-3.The Report assessed the effect that these legal flow control regimes had had on protecting human health and the environment. *Id.* at I-1.

After reviewing these widespread and wide-ranging efforts to regulate the flow of waste, the EPA concluded that "there are no empirical data showing that flow control provides more or less protection" to human health or the environment. *Id.* at ES-4. Instead, the EPA determined that "[p]rotection of human health and the environment is directly related to the implementation and enforcement of federal, State, and local environmental regulations. Regardless of whether State or local governments administer flow control programs, States are required to implement and enforce federally approved regulations *that fully protect human health and the environment.*" *Ibid.* (emphasis added).

Moreover, the EPA found no empirical evidence to suggest that flow control laws promote recycling or otherwise reduce the amount of waste entering landfills. "[T]here are," as the EPA concluded, simply "no data showing that flow controls are essential either for the development of new solid waste capacity or for the long term achievement of State and local goals for source reduction, reuse and recycling." *Id.* at III-74.

The Report's findings are significant to this case because they undercut entirely the argument that flow control laws provide environmental benefits to the states and municipalities that adopt them. The Report, which was undertaken at the direction of Congress and produced by an agency committed to ensuring that environmental interests are adequately protected, looked squarely at whether flow control laws provide any benefit to human health or to the environment. It found that they did not. *Id.* at ES-4. This conclusion, based as it is upon an in depth investigation of the waste management practices in each of the 50 states, undercuts the unsupported assumption of the Minnesota Supreme Court that the burdens this law imposes on interstate commerce are "not clearly excessive in light of [the District's] substantial interest in ensuring the financial security of the waste facility and promoting waste reduction." Pet. App. at A13. The only justification for the law that

remains plausible, therefore, is that the Minnesota law protects local economic interests. This is, however, a justification that this Court rejected in *Carbone*. See 511 U.S. at 394.

II. THE EPA'S REPORT CONFIRMS THAT RESPONDENT'S FEE AND SUBSIDY PROGRAM WILL LEAD TO ECONOMIC BALKANIZATION

The Report sheds light upon the purpose not only of the particular law that this Court is asked to review, but of the numerous similar laws either in force or under consideration around the country. The Report demonstrates that flow control laws neither conserve landfill space nor, as just discussed, promote human health; they serve, rather, only to ensure that local incinerators and waste-disposal facilities remain financially viable.

As an initial matter, the Report reveals that flow control ordinances have not increased the total capacity of America's landfills. As of 1995, the number of landfills in the United States had declined since the late 1980s. This reduction was due to older and smaller landfills closing, either because the facilities had reached capacity or because their operators had grown unwilling or unable to comply with new environmental regulations. FLOW CONTROL REPORT at III-63-64. Yet in spite of this reduction in the number of landfills, the total capacity of existing landfills actually increased over the same period of time. *Id.* at III-64. This was because larger disposal service providers such as Waste Management privately financed new landfills with capacities far exceeding the total capacity of the smaller landfills they replaced. *Id.* at III-65-66. State and local flow control measures, however, had no discernible impact upon this expansion of capacity. According to the Report, it was market forces that spurred this growth. *Ibid.*

State and local governments have played a role, however, in the growth of the nation's incineration capacity. The Report identified 145 waste incinerators in operation in 1992. *Id.* at III-52. These facilities relied heavily upon locally-enacted flow control measures to guarantee an uninterrupted stream of waste and, by so doing, to ensure their financial viability. *Id.* at III-52-54.

This Court's decision in *Carbone*, however, denied to local authorities the power to channel the flow of waste to local facilities and, by so doing, restored the freedom of movement to the interstate market in waste demanded by the Commerce Clause. Now the decision of the Minnesota Supreme Court threatens to permit municipalities and other governmental units once again to restrict the flow of interstate commerce in waste in order to promote these local waste disposal ventures.

Although this would confer upon municipalities the ability to ensure that their capital-intensive incinerators remain financially viable without having to resort to general revenue taxes, this Court explicitly refused to let such financial objectives justify similarly discriminatory laws in the past. Waste Management urges the Court not to retreat from this position, nor to allow the States to subvert the Court's holdings by enacting laws that in their practical effect are just as restrictive of interstate commerce as the law struck down in *Carbone*. Otherwise, the regional markets that have arisen to serve the national need for solid waste disposal will be undermined; the market will return to the pre-*Carbone* state of economic Balkanization; and the purposes and commands of the Commerce Clause will be defeated and ignored.

III. THE COURT SHOULD ESTABLISH THAT THE STATES MAY NOT USE SPECIAL PURPOSE TAXES LEVIED UPON INTERSTATE COMMERCE TO PROMOTE LOCAL COMPETITORS

The Commerce Clause has from the founding of the Nation been one of the central features of the Constitution. James Madison believed that "[the clause] was intended as a negative and preventive provision against injustice among the States themselves." *West Lynn Creamery*, 512 U.S. at 193 n.9 (quoting 3 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (1991)). Writing not long afterward, Justice Johnson called the creation of a national market one of the overriding purposes of the Constitution. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat) 1, 231 (1824). See also *Carbone*, 511 U.S. at 390 (citing similar precedents). And, indeed, the Commerce Clause has proven itself a tool remarkably well-suited to its overriding purpose of binding what had been 13

markets, separate and isolated from each other, into a single, cohesive, national market.

This need to protect the fluidity of national and regional markets is exemplified by the Court's line of cases involving the dairy industry. The Court has struck down schemes to protect in-state dairy farmers or local milk processors from interstate competition repeatedly and without exception. See, e.g., *West Lynn* (invalidating subsidy scheme for local dairy farmers); *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349 (1951) (striking down local ordinance that prohibited sale of milk unless pasteurized within five miles of city); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (invalidating state-imposed minimum resale price on milk imported from out of sate). In the same tradition, the Court has frequently stepped in to protect interstate commerce in waste — *Carbone* and *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources,* 504 U.S. 353 (1992), being two recent examples of this tradition.

The Court has established a bright-line rule that taxes that discriminate against interstate commerce by imposing a higher burden upon out-of-state competitors violate the Commerce Clause. See, e.g, *Guy* v. *Baltimore,* 100 U.S. 434, 443 (1880). Likewise, facially neutral taxes that in practical effect favor in-state businesses also violate the Commerce Clause. See, e.g., *Bacchus Imports, Ltd.* v. *Dias,* 468 U.S. 263, 273 (1984).

The Court has stated in dicta that subsidies that discriminate in favor of in-state businesses may be constitutional if they are funded from the general revenues of the State or one of its political subdivisions. See *West Lynn,* 512 U.S. at 199. Such subsidies arguably assist local businesses without burdening interstate commerce. *Ibid.* ("A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local businesses."). In the case of such subsidies, moreover, there are political safeguards inherent in the general fund appropriation process that effectively protect the interests of out-of-state competitors. See *id.* at 200.

But a subsidy awarded to in-state competitors unquestionably runs afoul of the Commerce Clause when it is funded not from general revenues, but from special purpose funds.[2] In *West Lynn Creamery*, the Court found a Massachusetts fee/subsidy scheme unconstitutional because "[i]ts avowed purpose and its undisputed effect [was] to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States." 512 U.S. at 194. The coupling of a fee with a subsidy made the program "more dangerous to interstate commerce" because such conjoining short circuited the usual safeguards of the political process to prevent abuse. *Id.* at 200. ("when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy").

A tax/subsidy scheme, like that struck down in *West Lynn Creamery* and that now employed by respondent, has the practical effect of placing the burden of the tax exclusively upon interstate commerce. It works this result by refunding the tax monies collected from in-state producers, while leaving unmitigated the tax burden placed upon out-of-state competitors.

Waste Management urges the Court to review and reverse the decision of the Minnesota Supreme Court because the distinctions that court drew between this case and *West Lynn Creamery* are so patently artificial that, if the decision is allowed to stand, regional markets for waste disposal services would soon be deprived of the protections they received in the wake *West Lynn Creamery*. The

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[2] Indeed, the concurrence in *West Lynn Creamery* eschewed any reliance upon safeguards from the political process, preferring instead to adopt a bright-line rule. 512 U.S. at 212 (Scalia, J., concurring). Accordingly, the concurrence's rejection of the Massachusetts tax/subsidy scheme turned exclusively on the fact that the subsidy did not come from the general revenues. Because of its source, the subsidy was not subject to use for "competing, non-protectionist purposes." *Id.* at 211-212. Waste Management submits that this case clearly reveals the need for the type of bright-line rule advocated by Justices Scalia and Thomas in *West Lynn Creamery*. Absent such a rule, the States will persist in their efforts to enact laws that evade the clear command of the Commerce Clause.

fees imposed are not general taxes falling within the permissible category of subsidies accepted by the Court. They were imposed by a self-contained political unit that is statutorily limited solely to activities related to waste management. They have been used, moreover, to subsidize a local competitor.

In addition, it is of no practical significance that the tax was imposed only upon local residents, as opposed to upon both in-state and out-of-state providers of waste disposal services. The law taxes both waste that is destined for disposal in other states and waste that is destined for disposal at the local incinerator. The subsidy, however, refunds this tax only to the local processors of this waste. The practical effect of the law, therefore, is to place the burden of the tax solely upon waste destined for interstate commerce and upon those who ultimately dispose of that waste.

The scheme approved below provides states and municipalities with a means of avoiding this Court's holdings in *Carbone* and *West Lynn Creamery* that is all too easy to implement both as a practical and as a political matter. The many municipalities and other governmental units that have invested in incinerators are likely to use the Minnesota precedent to regain the control over the commerce in solid waste that they once wielded with flow control laws. Waste Management urges the Court to grant the petition for certiorari in order to reaffirm its decisions in *Carbone* and *West Lynn Creamery* and put an end to such attempts to erode the protections of the Commerce Clause.

CONCLUSION

For the foregoing reasons, Waste Management respectfully requests that the Court grant the petition for a writ of certiorari and reverse the decision of the Minnesota Supreme Court.

Respectfully submitted.

DENNIS M. WILT
Waste Management of Minnesota, Inc.
2 Westbrook Corp. Ctr.
Suite 1000
Westchester, IL 60154
(708) 409-0700

EVAN M. TAGER
Counsel of Record
HAROLD S. REEVES
Mayer, Brown & Platt
2000 Pennsylvania Ave, NW
Washington, DC 20006
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